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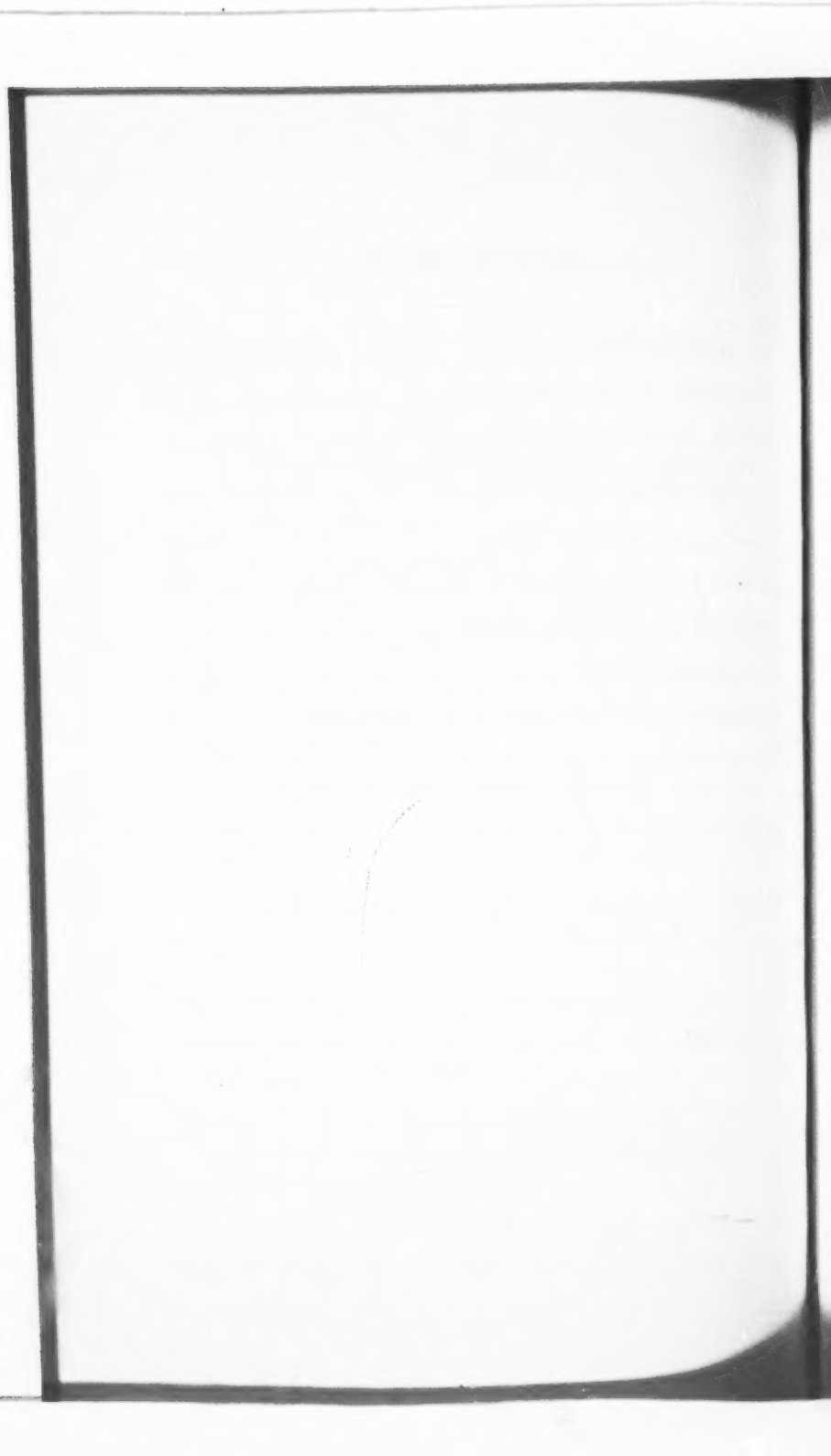

IN THE

Supreme Court of the United States

October Term, 1969

No. 947

GEORGE A. ROSENBLOOM,

Petitioner,

vs.

METROMEDIA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Third Circuit (A461) is reported at 415 F. 2d 892 (1969). The opinion of the United States District Court for the Eastern District of Pennsylvania (A435-56) is reported at 289 F. Supp. 737 (1968).

Jurisdiction

The judgment of the Court of Appeals was entered on September 15, 1969 (A472). A timely petition for a writ of certiorari was filed on December 12, 1969, and was granted February 24, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Should the rule established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), be broadened to prohibit a private citizen who is neither a public official nor a public figure from recovering damages for a defamatory falsehood relating to his involvement in a matter of public interest unless he proves that the statement was made with "actual malice"?

2. If a private citizen who is neither a public official nor a public figure must prove, in order to recover damages, that a defamatory statement was made with "actual malice," was the evidence in this case sufficient to support this finding by the jury?

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement of the Case

A federal trial jury awarded general and punitive damages for libel to the petitioner George A. Rosenbloom, a small independent distributor of magazines published by nudist groups, who was erroneously accused by Metromedia's Philadelphia radio station of being a "smut distributor" and "girlie book peddler." Another jury, in a Pennsylvania state court, had previously acquitted him of these charges in a separate criminal trial, under instructions that as a matter of law his magazines were not obscene (A224).

There is no issue concerning obscenity or "hard-core" pornography in this case. Any question on that score ended with Mr. Rosenbloom's acquittal in his trial for possession of obscene material. This case presents only the question whether a jury verdict awarding damages for libel should be disturbed.

When this controversy arose in October 1963, Mr. Rosenbloom had only recently given up his job as a salesman for the largest book and magazine distributor in the country to launch his own business. The Outdoor American Publishing Company had initially offered him a distributorship for the Philadelphia area the preceding year. Mr. Rosenbloom investigated the offer thoroughly. He found that the president of the company operated a nudist camp in Spokane, Washington. A lower court had once found his magazines promoting nudism obscene, but the Solicitor General confessed error when the case reached this Court. *Mounce v. United States*, 355 U.S. 180 (1957). The vice-president of the company, who made the offer of a distributorship, owned a nudist camp in Mays Landing, New Jersey, where he was an officer of the local Chamber of Commerce (A95-97).

Mr. Rosenbloom accepted the offer in May 1963 and agreed with the company to distribute only its publications (A97, 123). He was the newest and smallest distributor in Philadelphia, but his business prospered. His home was his office and his inventory was stored in a rented barn. By October 1 he had established accounts with 60 outlets (A98). On that day, Captain Clarence Ferguson, who headed the police department's Special Investigation Squad, decided to rid the city of pornography. He initiated a series of raids on city newsstands, during one of which Mr. Rosenbloom was arrested, apparently fortuitously, as he was making a delivery (A255-57). The police had received complaints that lurid materials were being sold, but there was no evidence that any of these complaints were directed at Mr. Rosenbloom's nudist magazines (A260). Three days later, the police raided his home and the rented barn he used as a warehouse, seizing inventories of magazines at both places. Mr. Rosenbloom, who had been released on bail after his first arrest, surrendered to the police upon hearing of the raids and was rearrested (A131).

Captain Ferguson's criteria for obscenity—"anytime the private parts is [sic] showing of the female or the private parts is [sic] shown of males"—had no relation to the proper constitutional standards (A258). So Mr. Rosenbloom was acquitted in May 1964, and the seized material was returned to him (A217, 224).

But long before his exoneration in criminal court, the media in Philadelphia had judged his case. Two series of radio broadcasts on Station WIP, which is managed and controlled by the respondent, are involved in this libel suit. The first series began with an announcement headlined "City Cracks Down on Smut Merchants" on the six o'clock

news for October 4, 1963 (A26). The broadcast stated (1) that the police had raided Mr. Rosenbloom's home; (2) that the police had confiscated a thousand magazines and arrested Mr. Rosenbloom on charges of possession of obscene literature; (3) that the police had also raided a barn rented by Mr. Rosenbloom and confiscated obscene books there; and (4) that Captain Ferguson believed the police had "hit the supply of the main distributor of obscene material in Philadelphia" (Plaintiff's Exhibit 1, A239, 350).

This newscast was repeated, with minor changes, during the remainder of the evening and again the next day (Plaintiff's Exhibits 2-8, A239, 352-68). The fact that Mr. Rosenbloom was arrested and his magazines seized was reported accurately, except for some confusion over addresses and the number of books (magazines, actually) confiscated (A119-26). In the initial newscasts, however, the station announced without qualification that the material seized in the second raid was obscene, assuming responsibility for this characterization, which Mr. Rosenbloom's later acquittal proved erroneous. In addition, Captain Ferguson's opinion that Mr. Rosenbloom was a major distributor of obscene material, variously reported by the station as a belief or a statement of fact by the officer, was wrong (*See, e.g.*, A350, 353, 356, 360).

The second series of newscasts, which were aired on October 21, October 25 and November 1, reported developments in a lawsuit Mr. Rosenbloom and the Outdoor American Publishing Company brought to enjoin further harassment and publicity by the police and the news media (Plaintiff's Exhibits 9-21, A239, 369-401). The complaint sought only to vindicate Mr. Rosenbloom's right to distribute the publisher's magazines, which they cor-

rectly asserted were constitutionally protected (Plaintiff's Exhibit 22, A239, 402-13). Station WIP, which was not a named defendant, repeatedly characterized the plaintiffs as "smut distributors" and "girlie book peddlers," and stated that they were attempting to force the defendants "to lay off the smut literature racket" (*See, e.g.*, A369, 376, 379, 380, 385, 390, 398).

At trial in this case, Mr. Rosenbloom testified that the broadcasts "put me out of business" (A171). Thirty-four of his 60 accounts "refused to do business with me" (A114). He was unable to obtain a single new account, although he solicited business from 81 prospective outlets in 51 towns or cities surrounding Philadelphia (A184). Many of his friends and relatives "haven't spoken to me since they heard about me on the radio" (A116). The effect of all this upon Mr. Rosenbloom, physically and psychologically, was scarcely surprising: "I couldn't sleep at night. I think I gained about 30 pounds inside of a month. I couldn't control my appetite or anything. I had just—well, I just was almost unfit to live with" (A171).

Mr. Rosenbloom also testified to an unsuccessful visit to Station WIP on October 27, 1963, four days before the final broadcast. When he asked to see or hear copies or tapes of the earlier news reports, the office receptionist allowed him to speak with Mr. Nate Wright, a part-time news broadcaster, on an intraoffice telephone. Mr. Wright played back one of the reports. When Mr. Rosenbloom asked if he was aware that his magazines were approved by the Supreme Court, Mr. Wright argued that the District Attorney said they were obscene. When Mr. Rosenbloom protested that the District Attorney had said publicly that his magazines were legal and not obscene (a

claim that the respondent did not challenge at the trial), Mr. Wright "just hung up" (A136-38).

District Court Proceedings

Mr. Rosenbloom brought this libel suit as a diversity action under 28 U.S.C. § 1332 in the District Court for the Eastern District of Pennsylvania. The case was tried before a jury in 1968. The trial judge rejected an instruction submitted by Metromedia based upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), on the ground that Mr. Rosenbloom "was in no sense a public man," and instead instructed the jury according to Pennsylvania law (A442). The trial judge refused to submit the question of special damages to the jury because there had not been an adequate showing that Mr. Rosenbloom's damages followed from the Station WIP broadcasts rather than from other media accounts and misaccounts.

The jury was charged that to return a verdict for general damages, they would have to find:

(1) That one or more broadcasts were defamatory in that they would tend "to so harm the reputation of the subject . . . as to lower him in the estimation of the community, or to deter third persons from dealing with or associating with him" (A323);

(2) That the defamatory statement(s) could reasonably be taken to have referred to the plaintiff (A324-25);

(3) That the station had violated its privilege "to report the news . . . so long as it does so fairly and accurately, and so long as that privilege was exercised reasonably and with reasonable care" (A326-27);

(4) That the statement was false (A328).

The jury was instructed that the plaintiff bore the burden of proof on all issues, including abuse of the privilege, except that the defendant had the burden of proving the truth of the assertions made (A340).

The jury was also instructed that in order to award punitive damages, it would need to find malice as that term was defined by Pennsylvania law; *i.e.*, "that these broadcasts were published with a bad motive or with reckless indifference to the rights of others" (A333).

The jury returned a verdict for Mr. Rosenbloom, awarding general damages of $25,000 and punitive damages of $725,000 (A343). The trial judge reduced the total verdict to $250,000 on remittitur, which Mr. Rosenbloom accepted (A457-59). Metromedia's motions in the alternative for judgment n.o.v. or a new trial were denied in a lengthy opinion by the trial judge, who held that the evidence was sufficient to justify an award of punitive damages (289 F. Supp. 737, A435-56).

The opinion stressed three factors which provided "sufficient evidence of a reckless disregard both of the truth of the defamatory assertions and the rights of the plaintiff" (289 F. Supp. at 745-56, A448). The first was Station WIP's refusal to allow Mr. Rosenbloom to present his side of the story when he visited its offices, which the trial judge equated with a refusal to retract or worse (289 F. Supp. at 746, A449-50). The second factor was the failure of Station WIP to investigate the truth of its charges. Particularly, the trial judge stressed the failure of Station WIP to examine either the court records or the magazines themselves before asserting in the second series of broadcasts that the plaintiffs were "girlie-book peddlers" at-

tempting to force the authorities to "lay off the smut literature racket" (289 F. Supp. at 746-47, A450-51). Finally, the trial judge found that the station's rude treatment of Mr. Rosenbloom and its failure to investigate were compounded by its inflammatory language which "smack[ed] of editorializing and a desire to create a sensation" (289 F. Supp. at 747, A451).

Appellate Proceedings

The Court of Appeals refused to attach controlling weight to the fact that Mr. Rosenbloom was not a public figure. In view of "the established public interest in the subject matter" of the broadcasts, the Court concluded that "proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in *New York Times Co. v. Sullivan* . . ." (415 F. 2d at 896, A467).

The Court next decided that the record did not support a finding of "federal actual malice . . . so as to be a proper case for the jury." The Court considered and rejected individually each of the factors which the trial judge had found to indicate a "reckless disregard for the truth." It decided that the station representative's action in hanging up on Mr. Rosenbloom "amounted to little more than an argument or a difference of opinion," which was of little "value in considering the earlier broadcasts" (415 F. 2d 897, A469). The Court attributed the failure of the station to investigate to the fact that it "was reporting fresh news developments," without commenting upon the trial court's observation that the complaint in the law suit, at least, was on file at least a week before the beginning of

the second series of broadcasts (*Compare* 415 F. 2d at 897, A469 *with* 289 F. Supp. at 746-47, A450-51). As far as the repeated references to "smut distributors" and "girlie-book peddlers" were concerned, the Court could not "see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity" (415 F. 2d at 898, A470).

Summary of Argument

The Court held in *New York Times Co. v. Sullivan*, 37 U.S. 254 (1964), that a "public official" must show "actu malice" in order to recover for defamation "relating to h official conduct." In subsequent decisions the Court ha extended the *New York Times* rule to libel suits by "publ figures" and has borrowed and applied the standard o actual malice in suits involving nondefamatory disclosure the discharge of public employees, and state libel proceed ings threatening national labor policy.

This case requires the Court to decide whether the ru of *New York Times* should be further broadened to appl generally to all libel suits. The plaintiff was a privat citizen in the strictest sense of the word before this co troversy. His arrest was newsworthy, but then so is vi tually anything the media choose to focus upon. Co sequently, if Mr. Rosenbloom must show actual malic then so must any private citizen suing for libel.

Application of the principles developed by this Cou in *New York Times* and subsequent libel cases, howeve demonstrates that Mr. Rosenbloom should not be require to prove actual malice. As a private citizen, his personali was not essential to public discussion of the newsworth events. He had no means to counterattack his critic and had not voluntarily assumed the risk of sharp publ criticism by pursuing a role of leadership in public affair

This suit differs markedly from every previous libel ca considered by the Court, and a new constitutional standa tailored to the needs of these facts is apropriate for lib suits by private citizens. The state-law standard of re sonable care applied by the trial court here meets the needs. Adequate criteria can be formulated to distinguis

private citizens from public figures. A standard of reasonable care promises sufficient certainty when applied to statements defamatory on their face to avoid the dangers of self-censorship by publishers, broadcasters and individuals who would speak out on public issues. Finally, the exercise of reasonable care can be ascertained by reference to objective facts reviewable by an appellate court.

Even if this Court should hold that the rule of *New York Times* must govern this suit, the Court of Appeals erred in overturning a jury verdict which in fact rested upon a finding of actual malice. The state-law definition of malice followed by the jury in awarding punitive damages was adequate to focus the jury's attention upon the proper inquiry—whether the radio station recklessly disregarded the truth. The failure of the trial judge to follow the precise language of *New York Times* should not require reversal in a suit tried before this Court has indicated that the actual-malice standard must apply to libel suits by purely private citizens.

Finally, the evidence here was sufficient to support the jury's finding of actual malice. The radio station not only failed to investigate the truth of its charges, but also refused to broadcast a retraction. It did so, moreover, despite its repeated use of inflamnatory language which should have warned the station that the exercise of a higher degree of care was reasonable.

ARGUMENT

I. The Principles This Court Found Decisive In New York Times And Succeeding Cases Neither Require Nor Justify An Extension Of The Requirement For A Showing Of "Actual Malice" To Suits For Defamation By A Private Citizen Who Is Not A Public Figure.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), ended a long era during which the law of defamation ignored our commitment to free speech. For the first time, this Court applied "the principle that debate on public issues should be uninhibited, robust and wide-open," *id.* at 270, to impose restraint upon a harsh law of strict liability that for centuries had punished critics of government for inadvertent misstatements of fact.[1]

The holding of *New York Times* that a "public official" must show "actual malice" to recover damages for defamation "relating to his official conduct," *id.* at 279, was purposefully narrow. But its reasoning, as commentators were swift to point out, was broad.[2] Subsequent decisions have explored its radiations. *Curtis Publishing Co. v. Butts*, 388

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[1] The late Professor Donnelly has provided the best recent discussion of the common law development of defamation in the English courts. *See* Donnelly, *History of Defamation*, 1949 WISC. L. REV. 99; *see also* Veeder, *History of Defamation I & II*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193-94; LEVY, THE LEGACY OF SUPPRESSION (1960).

[2] *See, e.g., Kalven, supra* note 1; *Pedrick, Freedom of the Press & the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581 (1964); *Note*, 67 COLUM. L. REV. 926 (1967), *Comment*, 75 YALE L. J. 642 (1966); *but cf. Note*, 51 *Va. L. Rev.* 106 (1965).

U.S. 130 (1967), applied the rule of *New York Times* to libel suits by "public figures." *Time, Inc. v. Hill*, 385 U.S. 374 (1967), borrowed the actual-malice requirement and applied it to a private citizen's suit claiming damages for a nondefamatory magazine story fictionalizing his experiences. Other decisions have borrowed the actual malice rubric where useful to meet the needs of particular circumstances. *See Pickering v. Board of Education*, 391 U.S. 563 (1968) (discharge of public employee); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (state libel suit threatening conflict with national labor policy).

The Court must decide in this case whether the rule announced in *New York Times* should be broadly applied to all libel cases. Mr. Rosenbloom was in every sense a private citizen before the Philadelphia media chose to spotlight him, erroneously, as a "smut distributor" and "girlie-book peddler." The public had no more and no less "interest" or curiosity in Mr. Rosebloom than in any other private citizen involuntarily made "newsworthy." If the *New York Times* standard applies to his suit for defamation merely because his arrest was "newsworthy," it must apply to every libel suit. For experience demonstrates that the media, not the courts, determine who and what is "newsworthy."[3] Since public curiosity is boundless, particularly when skillfully stimulated, so is the concept of "newsworthiness." Virtually any event in a man's life may sur-

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[3] *See*, e.g., Kalven, *The Reasonable Man & the First Amendment: Hill, Butts, & Walker*, 1967 SUP. CT. REV. 267, 283-84; Kalven, *Privacy in Tort Law: Were Warren & Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 336-38 (1966).

face, long after the fact, as "newsworthy."[4] The mere fact of publication demonstrates the publisher's belief that his audience will be "interested," and satisfies the test of "newsworthiness" for practical purposes.

But the Court need not and should not extend *New York Times* to Mr. Rosenbloom and all the ordinary citizens like him who may be defamed. Neither the principles found controlling in earlier libel cases nor the practical necessities of implementing these principles indicate that "actual malice" should be a rule of general applicability, overriding all existing state libel law. To the contrary, analysis of *New York Times* and succeeding decisions demonstrates that a more refined constitutional standard responsive to First Amendment values can be articulated and administered for libel suits by anonymous citizens.

A. The principles applicable to libel suits.

The *New York Times* case offered an ideal occasion to begin tailoring private tort law to constitutional principles of free expression. The full page advertisement found offensive there by the Alabama courts accused the police and the local community of mistreating the late Dr. Martin Luther King and Negro students active in the civil-rights struggle. The plaintiff Sullivan, the police commissioner of Montgomery, Alabama, had recovered a judgment for

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[4] For this reason, an extension of the actual malice rule to libel suits by private citizens would effectively require reversal of the New Hampshire libel case also before the Court, where the jury was allowed to return a verdict for the plaintiff without a finding of "actual malice" if it found that the allegation that a political candidate was a former "bootlegger" during Prohibition constituted a "purely private libel." *Monitor Patriot Co. v. Roy*, No. 891 *cert. granted* February 24, 1970. For if a plaintiff need not be a "public figure" to encounter the actual malice requirement, it is difficult to see how the fact that the libel was unrelated to his candidacy could be relevant.

$500,000. The suit thus punished the *Times* for publishing a criticism of government—and allegedly of a particular government official[5]—and this Court accordingly analogized it to a criminal conviction for seditious libel. 376 U.S. at 273-76.

This analysis in terms of seditious libel—together with the Court's conclusion that regardless of whether the Sedition Act of 1798 was consistent with the Founding Fathers' concept of the First Amendment, "the attack upon its validity has carried the day in the court of history," *id.* at 276—was sufficient to require reversal of the Alabama judgment. But the Court went on to elaborate two additional reasons to protect the advertisement involved. First, the plaintiff as a government official enjoyed a privilege under orthodox libel law to counterattack his detractors. The court discussed *Barr v. Matteo*, 360 U.S. 564 (1959), which dealt with federal officials, but also referred to state law. *See* 376 U.S. at 282 and n.22. Second, the Court pointed out that government officials, by voluntarily accepting the role of public leadership, deserve to be treated like judges as "men of fortitude, able to thrive in a hardy climate." *Id.* at 273, citing *Craig v. Harney*, 331 U.S. 367, 376 (1947).

Government officials are obviously not the only men who enjoy a platform to counterattack their critics, and who have voluntarily chosen to expose themselves to the vigorous, even vicious, debate that surrounds public affairs. *New York Times* accordingly contained far broader implications than its narrow holding, which soon emerged in

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[5] The Court held as an alternative ground for reversal that the evidence was constitutionally insufficient to support the jury's finding "that the allegedly libelous statements were made 'of and concerning' the respondent" Sullivan. 376 U.S. at 288.

succeeding cases. Although *Time, Inc. v. Hill*, 385 U.S. 374 (1947), was decided slightly before *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967), the opinions in the latter two libel cases, which were decided together, are best examined first.

Butts and *Walker* involved, respectively, a libel suit by the athletic director of a state university against a magazine that had accused him of fixing a football game and a libel suit by a retired Army general against a news service that had reported his leadership of a desegregation riot at the University of Mississippi. All the Justices agreed that the plaintiffs were "public figures" and that some measure of constitutional protection was demanded for utterances directed at them. The Court split, however, on the issue of how much protection. Chief Justice Warren spoke for the majority in applying the actual-malice standard of *New York Times*. 388 U.S. at 162-65. Mr. Justice Harlan, joined by three other Justices, argued for a constitutional standard of essentially gross negligence. *Id.* at 155.

Both the Chief Justice and Justice Harlan relied heavily upon the proposition that the plaintiffs, because of their position, could or should surrender some portion of the protection that private tort law would otherwise promise them. Both opinions reasoned that the public's "independent" interest in the plaintiffs allowed them to counter the charges made against them with the expectation that their version of events would receive media coverage similar to the original accounts. 388 U.S. at 154, 164.[6] Thus, Gen-

[6] Thus, Justice Harlan stressed the plaintiffs' "means of self-defense" in light of the fact that "both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications." 388 U.S. at 154. Chief Justice Warren defined "public figures" as those "who do not hold public office at the moment [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large," and went on to reason that "surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." *Id.* at 164.

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eral Walker had resigned his commission to pursue his political beliefs full time after a much publicized incident involving his indoctrination of troops overseas. Wally Butts, like the other principal in the alleged fix, Bear Bryant of Alabama, was a folk hero in the South.

A desegregation riot or a football fix is, of course, an important event in and of itself. But the public was peculiarly fascinated, as the media recognized, by the allegation that General Walker had led the charge at Mississippi, and that Wally Butts had sold out his boys. Since the public interest was piqued more by the men than by the events, the media predictably would be pleased to prolong the news value of the stories by publishing their denials.

In addition, Justice Harlan elaborated the assumption-of-the-risk theory touched upon in *New York Times* and suggested again in *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.12 (1966). The reasoning that General Walker had "by his purposeful activity . . . thrust . . . his personality into the 'vortex' of an important public controversy," 388 U.S. at 155, recognizes that an actor who voluntarily struts upon the public stage must expect brickbats as well as bouquets. The same is true of football coaches. The glamor of association with a big-time athletic program carries with it the pressure to produce a winning team—and a coach must realize that harsh speculations may follow a loss.

Finally, Chief Justice Warren rejected the argument that the *New York Times* rule could be limited to criticism of government by stressing the uncertain line between governmental and nongovernmental functions and institutions in modern life. *Id.* at 165. This reasoning has both a conceptual and a practical basis. Protection for critics of government may lie at the core of the First Amendment. But citizens must know many other things to exercise their

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sovereignty meaningfully.[7] And, even if a distinction between governmental and nongovernmental functions could be conceptually justified, the distinction is too elusive for reliable application. The risk is too great that protection will, in a particular case, be erroneously denied because of a failure to measure correctly the proximity of a "governmental" interest.

B. The principles applicable to suits for nondefamatory disclosures.

At first glance, the intervening decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), seems inconsistent with the reasoning of *New York Times* and *Butts*. The plaintiff there sued *Life Magazine* under a New York statute for a story that pretended to depict, but in important respects fictionalized, his family's experiences while held hostage by escaped convicts. This Court concluded that Mr. Hill should be required to prove that the nondefamatory falsehoods—actually, fictionalizations—were the product of actual malice, although (1) the subject matter of the story in no way remotely touched governmental interests; (2) the public had no "independent" interest in Mr. Hill which would encourage the media to publicize his version of the

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[7] This reasoning reflects the thinking of Dr. Meiklejohn, which has been consistently urged upon the Court in *New York Times* and succeeding cases, *see Note*, 67 COLUM. L. REV. 926, 938-42 (1967). Dr. Meiklejohn's principal works relevant to this problem are Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, and *Meiklejohn, Political Freedom* (1960) (containing his earlier book, *Free Speech and its Relation to Self-Government* (1948)). Mr. Justice Brennan has suggested that Dr. Meiklejohn might have approved the decision in *New York Times*. Brennan, *The Supreme Court & the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18-19 (1965). Dr. Meiklejohn, in fact, went further in commenting upon the case: "It is," he said, "an occasion for dancing in the streets." Kalven, *supra* note 1, at 221 n. 125.

incident; and (3) Mr. Hill and his family had in no way voluntarily thrust themselves into the vortex of public affairs.

But *Time v. Hill* conflicts with *New York Times* and *Butts* only if one begins with the premise that a single analytic framework should suffice for all private tort cases. Of course, all private suits touching speech must, after *New York Times*, meet First Amendment scrutiny. And the fact that this Court applied a standard initially formulated in a libel case to a suit involving a different cause of action in *Time v. Hill* may have encouraged the Court of Appeals here to conclude that the same analysis applies whatever the cause of action, and consequently that a result reached in one tort suit can be applied to any other tort suit involving a plaintiff similarly situated.

Such an uncritical reading of *Time v. Hill* ignores this Court's repeated caveats that defamation was not involved there, and that different considerations would be presented if it were. 385 U.S. at 384 n.9, 390-91. The subsequent decision in *Butts* demonstrates that the Court meant what it said. For if a decision that requires a private citizen to show actual malice in a suit for nondefamatory disclosure applied without further analysis to any tort suit by a private citizen, the Court would not have needed to pause over whether General Walker and Coach Butts were "public figures," let alone over the question of what standard should govern their suits.

Butts and *Walker* required several long opinions, despite the earlier decision in *Time v. Hill*, because the nature of the cause of action asserted represents an important factor in determining the appropriate constitutional standard to protect free debate. And nothing better demonstrates this truth than the difference between a claim for defamation

and the strange cause of action presented to the Court in *Time v. Hill.*

The law of defamation protects a man's reputation—an objective value, injury to which can be determined, as it was in this case, by reference to community standards. Its history is long. The local courts of England afforded redress for slander in the thirteenth century, long before the development of modern concepts of libel and seditious libel in the seventeenth century.[8] Defamation laws has traced a tortured and confused path over the centuries. But the tenacity of its harsh doctrines despite scholarly criticism must reflect a realization by courts and the community that reputation is both precious and protectable.

Time v. Hill, on the other hand, is commonly described as an "invasion of privacy" suit. Were it that and nothing more, the cause of action would be different enough from defamation. The "right to privacy," as a matter of private tort law, is famous as the cause of action created by a law review article.[9] In pristine form, it protects in Judge Cooley's phrase the "right to be let alone." [10] The values thus guarded, while real, are subjective in the extreme. The monetary equivalent of a tarnished reputation may be diffi-

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[8] "Defamation was one of the most common torts brought before the local courts in the Middle Ages. Shame was keenly felt and courts gave the offense a generous scope. In almost every action before a local court in the thirteenth century, the plaintiff will claim compensation, not only for damage . . . but also for the shame. . . ." Donnelly, *supra* note 1, at 100-01. The royal courts did not generally assert jurisdiction until much later, but Donnelly reports one case decided in 1265. *Id.* at 106-07. Seditious libel enjoyed its heyday during the seventeenth century in the Star Chamber as part of the general effort to regulate the printing press. *Id.* at 116-19. The earliest traces of seditious libel as an offense can be found in the series of statutes beginning in 1275 which punished *scandalum magnatum* (slander of magnates). *Id.* at 108.

[9] Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

[10] *Cooley,* LAW OF TORTS 29 (2d ed. 1888).

cult to calculate, but the hurt itself is clear. The test commonly employed for defamation—that the statement tends to lower the subject in the eyes of the community—reveals that the insult required is one appreciated and understood as such by the rest of the community.

Where one can justly ask "to be let alone," however, is anything but a matter of community consensus except in the most intimate areas of life. In many, if not most activities, one man may cherish the spotlight, another may ignore it, another may mildly shun it, and the rare man may agonize under the glare of publicity. This is not to say that no interest exists in being "let alone," but simply that its shifting, elusive quality makes its effective protection difficult.[11]

Moreover, the cause of action for "invasion of privacy" has accumulated almost as tangled a history in the 80 years since Warren and Brandeis published their article as libel law has acquired over more than eight centuries.[12] Thus, the public's "right to know" creates an obvious tension with the individual's "right to be let alone," with the result that many jurisdictions have carved an exception for reports about "newsworthy" people or events. And since "newsworthiness" as a practical matter is defined by the press and not by the courts, the result has been to create an

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[11] Thus, Professors Harper and James have struggled with "the delicacy of the problems raised and the difficulty of drawing the nice line which separates what the individual may keep to himself and what the public is entitled to know about him." HARPER & JAMES, LAW OF TORTS § 9.7, p. 690 (1956).

[12] *See generally*, Kalven, *Privacy in Tort Law—Were Warren & Brandeis Wrong*, 31 LAW & CONTEMP. PROB. 326 (1966); Wade, *Defamation & the Right of Privacy* 15 VAND. L. REV. 1093 (1962); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

exception that virtually swallows the original cause of action.[13]

To prevent its total disappearance, state law has sometimes carved an exception to the exception whereby the privilege for truthful reports of newsworthy matters disappears if events are "fictionalized" or distorted.[14] In this form, invasion of privacy may seem to closely approach defamation as a cause of action, in that both require falsity. But to sue successfully under the "false light" offshoot of invasion of privacy, the plaintiff must show *only* falsehood. Unlike a suit for defamation, he need not show that the statement has injured his reputation. Indeed, a quite flattering portrayal to the community, if false or fictionalized, may create liability under this doctrine. When this happens, it is oftentimes difficult to perceive just why the plaintiff feels injured, or how the falsity contributed to that injury.

The path of invasion of privacy as a cause of action in New York State demonstrates this problem, with an additional wrinkle. The added complication is that while the New York statute is captioned the "Right of Privacy," its text refers to the unauthorized use of a person's name or likeness "for advertising purposes," and the background of the statute suggests that its goal was to protect private

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[13] *See* note 3 *supra.*

[14] Dean Prosser finds four separate torts huddled under the privacy tent. *See Prosser,* LAW OF TORTS § 112, pp. 832-42 (1964). "Public Disclosure of Private Facts" corresponds roughly to the "pure" form of invasion of privacy described here. "False Light in the Public Eye" corresponds to the "fictionalization" variant described here. "Appropriation" is the use of a person's name or likeness for commercial purposes without his consent, and may root more in the plaintiff's desire for compensation than for privacy. "Intrusion" causes injury not by disclosure but rather by the simple fact that a private part of life has been observed or overheard.

citizens from having the commercial value of their name or likeness appropriated without compensation.[15] The New York courts had interpreted the statute more broadly before *Time v. Hill*, however. They had also recognized the "newsworthy" privilege, and the "false light" exception to that privilege.

As matters stood when *Time v. Hill* arose, therefore, the New York statute served a variety of purposes in a variety of strange ways. It protected a person's property right in his own name or likeness, but, because of the "newsworthy" privilege, only if the unauthorized use "fictionalized" his life or presented him in a "false light." *See, e.g., Spahn v. Julian Messner, Inc.*, 18 N.Y. 2d 324, 221 N.E.2d 543 (1966).

The statute also protected the right of a citizen who did not wish to profit from his fame simply to be left alone. The Hill family, for example, did not wish to exploit the commercial opportunities created by the public's curiosity about their experiences. They wanted simply to forget the incident, and go on with their private lives—even going so far as to move to a new home in a new community to pursue this goal. When *Life Magazine* published the story which in part fictionalized their ordeal, Mr. Hill and his family felt injured because of the renewed publicity, rather than because of the fictionalized aspects of the story—which portrayed the Hills rather more heroically than was the case, in any event.

As a consequence, reasonable men could differ concerning the degree of judicial protection to which the plain-

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[15] This represents the third of Dean Prosser's privacy torts, that of "Appropriation." For a succinct description of New York law, *see Note*, 67 COLUM. L. REV. 926, 933-34 (1967).

tiffs should be entitled. Since the New York statute created a cause of action only erratically—when the defendant fictionalized or falsified a story in some respects, and not necessarily in any respect that contributed to the plaintiff's sense of injury—this Court quite justifiably concluded that, at the very least, the falsehood or fictionalization should be associated with some real culpability on the part of the defendant. If defendant had proceeded recklessly—*i.e.*, with actual malice—then there was no reason to protect him from liability, however strange and illogical the cause of action recognized under state law.

The majority opinion by Mr. Justice Brennan reflected this analysis. While it carefully tracked out the distinction between a pure invasion of privacy suit and the latter day "false light" offshoot created by New York law, the opinion viewed such suits in general and Mr. Hill's suit in particular as actions bottomed in publicity rather than falsehood. Thus, in distinguishing between libel suits and privacy suits, and emphasizing that its decision applied only to the latter, the Court reasoned:

> "All libel cases concern public exposure by false matter, but the primary hurt being compensated is damage to reputation. In the 'right of privacy' cases, the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damages." *Id.* at 385 n. 9.

And in explaining why Mr. Hill should be required to surmount the barrier of demonstrating actual malice in order to recover under the New York statute, the majority clearly viewed the issue as involving publicity rather than falsehood:

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this

exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press." *Id.* at 388.

This reasoning is compelling when mere publicity is involved. It loses its force, however, when defamation is considered. Exposure of one's reputation to damaging, defamatory calumny should not be a "concomitant of life in a civilized community." The injury is clearer, less justifiable, and more susceptible to judicial redress.

C. The need for a new constitutional standard for libel suits by a private citizen.

The preceding discussion has shown that (1) in *New York Times* and *Butts* the Court has analyzed libel cases within a framework which recognizes both the importance of "uninhibited, robust and wide-open" public debate and the plaintiff's "prior activities and means of self-defense;" and (2) the Court has followed a quite different analysis in suits for nondefamatory publicity which focuses upon the peculiar nature of the plaintiff's cause of action rather than his prior activities.

The jury awarded Mr. Rosenbloom damages for defamation, not for any disclosure of his private affairs. In deciding whether that verdict should be overturned, the analysis of *New York Times* and *Butts*, rather than *Time v. Hill*, is accordingly appropriate. By that calculus, Mr. Rosenbloom presents a quite different case for this Court than did Police Commissioner Sullivan, General Walker or Coach Butts. He was an anonymous citizen, attempting to launch his own business, when the police began their raids. The news story, and there undoubtedly was a story, was that the police were beginning a crackdown, and twenty-nine arrests

had been made. There is no indication why Station WIP singled out Mr. Rosenbloom by name, except that Captain Ferguson apparently decided, for whatever reason, that he was a major distributor of pornographic literature.

The irrelevancy of Mr. Rosenbloom to the story as a personality is shown by Station WIP's total lack of interest in him. There is no indication that the station attempted to contact him at the time of the arrest. When he protested the later broadcasts, a station representative hung up. General Walker and Coach Butts, in contrast, had deliberately chosen the public spotlight. The stories involving them would have been meaningless without a description of them and their roles—like playing Hamlet without Hamlet. And since they were the protagonists of their respective dramas, they could defend themselves and counterattack their critics.

In short, this case is realms removed in all relevant respects from *New York Times* and *Butts*. Not only was Mr. Rosenbloom so far removed from government office or even a role in public affairs that no danger of punishment for seditious libel could infect the jury's verdict, but a full discussion of the newsworthy events did not justify, let alone require, the defamatory destruction of his reputation. He had not by his "prior activities" sought public fame nor voluntarily assumed the risk of public defamation. And he had not the slightest "means of self-defense."

The Court has in the years since *New York Times v. Sullivan* formulated and applied rules which regulate activities presenting First Amendment issues with a sharp eye for the parties involved and the facts surrounding their exercise of free speech. For example, in regulating employer speeches during union organizing campaigns, the Court

requires that communications be "carefully phrased on the basis of objective fact" to avoid any "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969).

The Court has also concluded that states may properly apply a stricter test for obscenity to protect younger readers. *Ginsberg v. New York*, 390 U.S. 629 (1968). And in accepting this variable standard for obscenity, the Court approved a state statute under which criminal liability hinged upon whether the defendant had "made a reasonable bona fide attempt to ascertain the true age" of a magazine purchaser. *See id.* at 645, 646.

The importance of opportunities for counterspeech has been underscored in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Because only a limited number of stations can broadcast at once, the Federal Communications Commission has a fairness doctrine which requires broadcasters to offer reply time to victims of personal attacks and to persons differing with station editorials. Despite forceful arguments that this doctrine will discourage stations from broadcasting controversial material, because of the scheduling difficulty and cost of providing reply time, this Court approved the fairness doctrine in *Red Lion*. The core of that decision is the recognition that "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas" is best served by rules that strive for a fair presentation of both sides of an issue, even if those rules entail some risk that broadcasters will avoid controversial material. *See id.* at 390-93. The Court stressed that its constitutional analysis proceeded from the evidence then available to it. "If the experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of

coverage, there will be time enough to reconsider the constitutional implications." *Id.* at 393.

This case does not involve employer coercion, obscenity or the fairness doctrine.[16] But the approach followed by the Court in protecting First Amendment values in those areas is relevant here. The decisions just discussed do not tolerate suppression of speech. They do recognize that the "breathing space" needed for First Amendment values depends upon the facts of each situation, and that particularized constitutional standards can and should be fashioned accordingly. The unique problems presented by libel suits involving private citizens involuntarily swept up in public controversy deserves the same treatment.

The critical question is what constitutional standard will protect public debate here. We believe that the Pennsylvania law applied in this case provides an answer. The trial court charged the jury that "a news medium has a right to comment upon the news and to report the news. . . . so long as there is no intention to injure the plaintiff personally, and so long as that privilege is exercised reasonably and with reasonable care" (A 326). This charge properly stated Pennsylvania law. *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963); *see also Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949).

Purcell represents a careful attempt by the Pennsylvania Supreme Court to protect public debate in a case present-

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[16] Even if the fairness doctrine applied to news broadcasts, Station WIP failed to notify Mr. Rosenbloom of its attack and in fact rejected his plea for fair treatment when he visited the station to protest. *See Red Lion*, 395 U.S. at 372. Station WIP can therefore scarcely advance the doctrine as defense to this suit or as a justification for privilege—if indeed the fairness doctrine should, if applicable and complied with, offer a broadcaster as a regulated firm greater latitude for libel.

ing facts remarkedly similar to this suit. A radio station there had broadcast a documentary story concerning an alleged racket in the towing of cars. The plaintiff, like Mr. Rosenbloom, was an anonymous citizen the radio station seized upon to dramatize its story. In holding that the station should be liable because of its failure to exercise reasonable care to determine the facts, the court distinguished reports concerning famous figures from the needless, defamatory spotlighting of anonymous citizens:

> "The highlighting of Purcell in the broadcast could not be attributed to his being a person of public importance or even one at all known to the general public. In the vast panorama of the population of the metropolitan city of Philadelphia he was only a blur in the picture. This blur [the station] proceeded to enlarge under the magnifying glass of exaggeration, it was then sharpened with a pencil and keen knife of purpose, colored to meet the design of the defendant, until what was a gray, meaningless dot of anonymity became the portrait of an enemy of society, a 'mug,' a 'racketeer,' a criminal." 411 Pa. at 179, 191 A. 2d at 668.

In determining whether a standard of reasonable care, rather than the actual-malice requirement of *New York Times*, is appropriate for this case, the Court must consider three questions: (1) whether adequate criteria can be formulated to distinguish cases in which a reasonable care standard will be appropriate from those requiring application of the *New York Times* rule; (2) whether a standard of reasonable care has sufficient certainty in experience to protect defendants and avoid the dangers of self-censorship; and (3) whether the exercise of reasonable care can be determined by objective facts susceptible to review, as all factual determination freighted with constitutional overtones must be reviewed, by appellate courts.

The answer for the first question can be fashioned from the distinction suggested in *Butts* between libel suits by public figures and libel suits by anonymous citizens. There are sound reasons for requiring a stricter standard in the former case: because of the "independent" public interest in such figures, their personalities are essential to any discussion of public affairs; their stature allows them to respond effectively to criticism; finally, they have voluntarily thrust their personalities into public debate. None of these considerations apply to anonymous citizens generally, or to Mr. Rosenbloom in particular.

The line between public figures and anonymous citizens is not impossible to draw. The test suggested by *Butts* is whether the public had an "independent" interest in the person before the controversy began. *See* 388 U.S. at 154; *cf. id.* at 164. The Court can insist upon rigorous criteria for anonymity, which will nevertheless protect millions of private citizens, the vast majority of the population. This will be true even if the Court considers a public figure everyone whose name has figured in public discussion or a published report over the longest period during which his personality might have remained in the public consciousness. It will still be true even if the Court, in addition, considers that anyone who has "participated in public debate on an issue of grave public concern," *Pauling v. News Syndicate*, 335 F.2d 659, 671 (2d Cir. 1964) (per Friendly, C.J.), or attempted to "shape events in areas of concern to society at large," 388 U.S. at 164, has thereby become a public figure.

The Court may look to the common law of defamation as well as to common sense in order to distinguish public figures from anonymous citizens. The fair comment rule is constitutionally inadequate because it fails to protect mis-

statements of fact, as opposed to comment upon disclosed facts. But court determinations and commentators' analyses of the scope of the rule offer a useful body of experience in determining criteria for who is a public figure.

The usual shorthand statement of the rule is that it protects comment upon "matters of legitimate public interest." *See Harper & James, Law of Torts*, § 5.28, p. 456 (1956). The adjective "legitimate," however, conceals the essential question. As Judge Leventhal has pointed out in a careful opinion distinguishing the wide sweep of the "newsworthy" privilege in invasion-of-privacy suits from the narrower scope of the fair comment rule,

> "The touchstone [in determining the applicability of the fair comment rule] is not whether the public is interested in [the] plaintiff's views or conduct, for presumptively that applies to everything in a newspaper."
> *Afro-American Publishing Co. v. Jaffe*, 366 F. 2d 649, 657 (D.C. Cir. 1966).

The courts have generally meant more by the phrase "matters of legitimate public interest" than "matters of mere public curiosity." *See, e.g., Note*, 67 *Colum. L. Rev.* 926, 948 & n. 159 (1967); *Developments in the Law: Defamation*, 69 *Harv. L. Rev.* 875, 925-27 (1956). The occasional confusion in decisions implying the contrary has arisen from the ambiguity of the word "interest." The public is "interested" in anything about which it is curious, but it has an "interest" only in certain matters which directly affect it. The customary reliance upon the modifier "legitimate" signifies that the fair comment rule, unlike the law of invasion of privacy, travels on this restricted meaning of "interest."

Thus, the Restatement of Torts and the leading tort commentators analyze the fair comment rule under the head-

ings of discussions of public officers and candidates, public institutions, and voluntary offerings to the public of objects of art and science. *See generally Restatement of Torts*, §§ 606-10; *Harper & James, Law of Torts*, § 5.28 (1956); *Prosser, Law of Torts*, § 110, pp. 812-16 (1964); *cf. Newell, Slander & Libel*, §§ 477-504 (1924). The public "interest" in officers and candidates for office is clear. Similarly, public institutions have been defined to include not only schools and hospitals, but private enterprises which "affect the general interest of the community." *Prosser, Torts*, p. 813. And men involved with public institutions may accordingly become, in some circumstances, public figures.

The law dealing with offerings to the public is particularly important in seeking criteria to determine who is a public figure. The privilege of comment allows vigorous criticism of anything offered up for public judgment–a play, a novel, an invention or a product. But the rule allows criticism of the person who makes the offering only to the extent that his personality and motivations are relevant to an evaluation of the product. *See Harper & James, Torts*, p. 461; *Restatement of Torts* § 609, Comment (c).[17] This distinction, and it has proved a workable distinction, has allowed the courts to protect debate upon objects and persons in the public domain, while discouraging needless and irrelevant defamation of private reputations.

A careful examination of the established boundaries of the fair comment rule shows that Mr. Rosenbloom, an anonymous citizen by the test of common sense, was also

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[17] This rule of relevancy places "purely private libels" outside the scope of the fair comment doctrine. See HARPER & JAMES, TORTS § 5.28, p. 460; *cf. note* 4 *supra*.

not a public figure if that term is defined by reference to the fair comment rule. He was not a crusader for nudist magazines, let alone for smut. As the record indicates, Mr. Rosenbloom did not want to offer anything controversial to the public, simply to earn a living. Having helped place the magazines on the market, even if only as a middleman, he would have had no complaint had Station WIP broadcast an editorial saying that these magazines, while legal, were offensive to the station management and, it thought, to the bulk of the community. But to air that viewpoint, the station would scarcely need to or be justified in vilifying Mr. Rosenbloom, as it in fact did. He had not offered his personality and motives for criticism, either directly or as a necessary corollary of distributing his magazines.[18]

As for the second question, a standard of reasonable care for libel suits by anonymous citizens offers sufficient certainty to avoid any danger of self-censorship by publishers. As a general matter, reasonable care is a familiar standard in tort law, which this Court has applied in resolving constitutional problems, including those of the First Amendment. *See Ginsberg v. New York;* 390 U.S. 629, 645, 646 (1968) (discussed *supra*).

The Court rejected a negligence standard in *Time v. Hill* because "negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity." 385 U.S. at 389. That reasoning is cogent when nondefamatory publicity is involved—for in most matters, who can say what disclosure a given plaintiff will find objectionable. But that consideration has no force where utterances are

[18] Several weeks after the police arrests, and the ensuing media attacks upon his reputation, Mr. Rosenbloom initiated a lawsuit to prevent such harassment and publicity. It would, of course, be a cruel hoax if his defamers could point to this effort toward self-defense to justify both the original and further defamation.

defamatory on their face. If an exception is granted for the rare cases of extrinsic libel where the statement carries no warning of injury upon its face, (*e.g.*, a newspaper reports the birth of twins, without realizing that the couple has been married only a month), a rule requiring reasonable care in private citizens' libel suits would not threaten defendants with surprise.

The fact that tort law has found reasonable care a workable standard generally does not end the inquiry. The particular problems of public debate in the broadcasting and publishing industries must be examined to determine whether the standard is workable there. This concrete inquiry can be pursued along with the third relevant question, whether reasonable care can be determined by reference to objective facts reviewable by an appellate court. There are dangers at both extremes here—either from a total want of objective criteria, or from such a rash of conflicting evidence of care that judgment becomes erratic. But in fact the analysis is workable, both for publishers beforehand and courts exercising hindsight. This is best demonstrated by examining the facts of this case.

A test of reasonable care involves two inquiries—how much care was exercised, and how much care would be reasonable under the circumstances. As to the first, the initial question is what investigation was made to determine the facts. The record here indicates that Captain Ferguson spontaneously reported his raids to Station WIP. A station representative at trial could not recall having previously received any false reports from Captain Ferguson; he did not, on the other hand, testify that Captain Ferguson was known to the station or had provided reliable evidence before (A 293-94). The defendant did not introduce evidence of any attempt to investigate the accuracy of Captain

Ferguson's report, and its representative could not recall any investigation when questioned by plaintiff's counsel (A 33). As far as its news reports concerning the lawsuit are concerned, the station representative suggested that the station generally had contacts at the courthouse, but refused to be more specific (A 55-56; 72). So, as far as the plaintiff could determine at trial, Station WIP broadcast the reports upon the basis of an unsolicited report from a police officer unknown to the station, and on the unsubstantiated strength of unspecified tips from some unidentified person at the courthouse.

When the defendant is a broadcasting company, a second factor in determining the exercise of care is the steps by which incoming reports and investigations of those reports (if any) are translated into broadcast copy. The record here shows that individual newscasters at Station WIP normally write their own copy, exercising their own judgment as to what is newsworthy and how it should be phrased (A 15-17; 59-61). Upon occasion, the news is broadcast by different members of the news department than write the copy (A 45, 73). In addition, newscasters frequently rework material to change its language and keep a story fresh (A 44, 67, 69, 70). These ad hoc procedures allow individual newscasters considerable leeway to spice up reports, as happened here. The record does not indicate that anyone outside the Station WIP newsroom described Mr. Rosenbloom as a "girlie book peddler" at the time he initiated his lawsuit, or characterized that suit as attempting to force the authorities to "lay off the smut literature racket."

A final indication of the exercise of care is the willingness of a defendant to correct earlier broadcasts in light of later information. Here, of course, the station representative's

response when Mr. Rosenbloom protested the broadcasts and offered to demonstrate their error was to hang up.

In determining how much care would be reasonable, there are again several factors. First, how timely was the material published? If "hot news" is involved, the time for investigation is limited, and no checking may be possible. *Cf. Butts,* 388 U.S. at 157. News flashes therefore often prove unreliable—consider, for example, the confusion created by the first reports of Pearl Harbor, or the assassination of President Kennedy or Robert Kennedy. For that very reason, "news bulletins" are often identified as such. But however "hot news" should be handled, that issue is irrelevant here. The first broadcast concerning Mr. Rosenbloom's lawsuit was aired at least a week after his complaint was filed. Station WIP scarcely had suddenly breaking news on its hands.

A second important factor in determining how much care is reasonable is the nature of the defendant and its operations. A private individual speaking out on a public issue normally has few if any investigatory resources, does not make a profession of separating fact from fiction, and does not represent himself to his audience as an authority. Newspapers and radio stations, at the other end of the spectrum, publish or broadcast the news every day. They have professional staffs who make the collection and evaluation of news their business, and who are held out to the public as experts (A 10). The station's product is advertised as the "news," and the public has certain expectations concerning the preparation that goes into the news, and attaches weight to it accordingly.

The nature of the utterance is a final determinant of how much care is reasonable. Thus, the fact that a broadcast uses inflammatory language, as was the case here,

may not be indicative of what defendant's state of mind was. But it is relevant in determining what the defendant's state of mind should have been. When serious charges are repeatedly made against a private citizen with no means to reply, it is "reasonable" to expect a higher degree of care than when a news broadcast concerning an event of the day tangentially may brush the reputation of someone indirectly involved.

In short, the evidence in this case demonstrates that Station WIP exercised minimal care—it would not stretch the facts to say no care—in circumstances under which the relative staleness of the news, the position and expertise of the defendant, and the nature of the accusations all permitted and demanded some care for the truth of the broadcasts made.

More important, this analysis of the present case demonstrates that determinations of reasonable care can be cast in a framework which looks toward a limited number of objective facts, susceptible to evaluation by possible defendants before defaming anonymous citizens, and susceptible to review by appellate courts after the event.

II. The Jury In Assessing Punitive Damages Found Upon Adequate Instructions And Sufficient Evidence That Station WIP Acted With Reckless Disregard For The Truth In Defaming Mr. Rosenbloom.

We have argued that the actual malice requirement should not be applied to all libel suits, and that the Pennsylvania standard of reasonable care provides a workable rule for suits by private citizens that will provide "breathing space" for First Amendment values. This Court may disagree. If so, the Court of Appeals nevertheless erred

in overturning a jury verdict which rested upon a finding of malice.

The issue hinges upon the adequacy of the instructions to the jury, and the sufficiency of the evidence to support their verdict. The trial judge declined to instruct the jury in the exact language of *New York Times*. But the jury was charged that to award punitive damages it would need to find "malice," which the trial judge defined under state law as "a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to truth" (A 333). Elaborating, the trial judge went on to charge the jury that punitive damages:

> "really are awarded for outrageous conduct, as I have said, with a bad motive or reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard to the rights of others, or reckless indifference to the rights of others." (A 333).

These instructions are strikingly similar to those given the jury in *Curtis Publishing Co. v. Butts*, where this Court upheld the jury's award. See 388 U.S. at 165-66.[19] As in *Butts*, the jury was told that it could predicate a finding of malice upon evidence showing ill will or spite toward the plaintiff. Snch an instruction falls short under *New York Times*. But the Court regarded the deviation as harmless error in *Butts* since "counsel for *Butts* continually pressed upon the jury in argument that the defendant had failed to exercise a minimum of care [and] he did not seriously

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[19] The jury was instructed in *Butts* that "actual malice" under Georgia law denoted "wanton or reckless indifference or culpable negligence with regard to the rights of others" and included notions of "ill will, spite, hatred and an intent to injure one."

contend that the Saturday Evening Post was actuated by preexisting animosity toward *Butts*." 388 U.S. at 156 n. 20. The same is true here. The evidence was not directed toward a showing of ill will or spite, and indeed Mr. Rosenbloom's counsel conceded in his summation that "it is clear that no one at WIP harbored any personal animus toward George Rosenbloom" (A 448). In addition, as in *Butts*, the instructions to the jury "focused on the threshold requirement of falsity," 388 U.S. at 166, and therefore "the reference in the instructions to wanton or reckless indifference . . . most probably resulted in a verdict based on the requirement of reckless disregard for the truth of which [the Court] spoke in New York Times" (A 328).

The trial in *Butts* occurred before the decision in *New York Times*, and the Chief Justice in allowing the jury verdict to stand pointed out that "in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established." *Id.* If this case involved a public figure or a public official, the instructions given below accordingly would not be adequate. But just as the trial judge in *Butts* had no reason to expect the advent of *New York Times*, the trial judge in this case had no reason to foresee its expansion to include a libel suit by a private figure, if indeed that is to be the result. In denying the defendant's motion for a judgment n.o.v. or a new trial, the trial judge carefully examined the opinions of this Court, and found no decision indicating that the *New York Times* rule should be applied to the case before him. Consequently, a remand of this case for retrial under clinically proper instructions is unnecessary to encourage lower courts to comply with decisions or mandates of this Court. As in *Butts*, the relevant inquiry is whether the jury in fact made the necessary finding upon

instructions adequate to focus its attention upon the proper question. And, as in *Butts*, the instructions were sufficient for this purpose.

As for the sufficiency of the evidence, this Court has emphasized that the burden of proof to show reckless disregard of the truth with "convincing clarity" is heavy:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Earlier cases have held that a failure to investigate beforehand does not meet this burden. See *id.* at 733; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (opinion of Harlan, J.). And in *New York Times Co. v. Sullivan*, the Court held that a refusal to print a retraction was not sufficient under the facts of that case, without deciding wheher a refusal to retract "may ever constitute such evidence." 376 U.S. at 286.

The Court of Appeals, in attempting to apply these decisions, considered "seriatim" and rejected as individually insufficient each discrete item of evidence. (415 F. 2d at 897, A 468). But the important point is that evidence is cumulative, and should not be compartmentalized for rejection piece-by-piece. Station WIP not only failed to investigate, it also rudely rebuffed Mr. Rosenbloom when he asked the station to correct the newscast. Under *St. Amant* and other cases, the failure to investigate would alone be insufficient, of course. The adequacy of the refusal to retract, considered alone, is more debatable. Neither of the two reasons relied upon for rejecting such evidence in *New York Times* is present here—the defama-

tory broadcasts clearly referred to Mr. Rosenbloom,[20] and Station WIP, rather than asking for an explanation of the point, flatly hung up on Mr. Rosenbloom. See 378 U.S. at 286.

It is unnecessary to decide whether even this discourteous refusal to retract demonstrates actual malice. Rather, the evidentiary value of the failure to retract must be considered together with, rather than separately from, the failure to investigate.

From start to finish in these broadcasts, Station WIP demonstrated not the slightest interest in determining the truth, up to and including its rejection of Mr. Rosenbloom's offer to demonstrate the truth. A holding that this evidence is insufficient "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" would be tantamount to a holding that defendants can avoid doubts and therefore liability by steering so far clear of the facts, even when those facts are put squarely in their course, that they never consider the issue of truth.

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[20] The first series of broadcasts referred to Mr. Rosenbloom by name. The second series did not, but the jury was properly instructed that it must find that a defamatory broadcast "could reasonably be taken to have referred to the plaintiff" (A324-25). The trial judge found the evidence on this point sufficient under Pennsylvania law (289 F. Supp. at 744, A444-46). In any event, since Station WIP at no time sought separate rulings on the two series of broadcasts, it can scarcely now object if the two series are considered together (289 F. Supp. at 747, A452).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the case remanded with directions that judgment be entered for the plaintiff.

Respectfully submitted,

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